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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TED E. CHRISTENSEN et al., Plaintiffs and Appellants, v. WILLIAM W. SMITH, Jr., Defendant and Respondent.	G039923, consolidated with G040103 (Super. Ct. Nos. 07CC19622, 07CC19727) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Gerald N. Shelley for Plaintiffs and Appellants.

Prenovost, Normandin, Bergh & Dawe and Michael G. Dawe for Defendant and Repondent.

* * *

Ted E. Christensen and his wife, Eve L. Christensen, appeal from a judgment denying their petition to vacate or correct an arbitration award in favor of William W. Smith, Jr., and granting Smith's petition to confirm the award. The Christensens contend the arbitrator made errors of law that are reviewable on appeal and that the trial court erred by failing to vacate the award because the arbitrator was biased. As we explain below, these contentions are without merit and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Smith bought the Christensens' home on Harbor Island in Newport Beach in November 2004 for $8,350,000.00. After Smith moved in, he received a letter from the city informing him the home's second dock, apparently running along the property line, actually belonged to his neighbor and would be torn down. The parties submitted the issue of whether the Christensens failed to disclose to Smith the true ownership of the dock to binding arbitration. Michael Dawe represented Smith, and James Bohm represented the Christensens.

The arbitrator found the Christensens' real estate agent marketed the property as having two boat docks.[1] The arbitrator concluded the Christensens failed to disclose a material fact when they did not alert Smith the neighbor had a unilateral right to relocate the dock solely within his property lines. In a tentative decision on April 4, 2007, the arbitrator awarded Smith, based on expert testimony, $543,451.00 as the value of the dock.

[1] Smith had his own agent, but both agents worked for the same company, Prudential Realty, so the parties executed dual agency waivers in the real estate sales contract.

Earlier, on March 12, 2007, Dawe, Bohm, and the arbitrator had separately attended a St. Patrick's Day party hosted by Aitken, Aitken & Cohn at Muldoon's Irish Pub in Newport Beach. According to Dawe's declaration, the arbitrator greeted him in the entryway and remarked he had just "'bumped into . . . your opposing counsel in the arbitration hearing,'" which had concluded on March 9th. The arbitrator proceeded to mingle with others at the gathering. Within moments, Bohm entered, exchanged cordial greetings with Dawe, and the pair parted amicably after Dawe commented on the "'small world' irony of the three of us happening to be in the same spot . . . so soon after having spent the last two business days arbitrating our hotly contested matter."

After the arbitrator released his tentative decision on April 4th, Bohm e-mailed Dawe on April 11th with "concerns" that the arbitrator was biased. Bohm stated: "My concerns were initially aroused when I went to Wylie Aitken's St. Patrick's Day party and saw you having drinks with [the Arbitrator] in a small huddle of people. You were approximately one inch from the Judge. That event was one business day after the matter was submitted to the judge for binding determination. After seeing that I made some inquiries and I have been advised that you are both in the Celtic Bar Association and regularly attend meetings together at Muldoon's in Newport Beach." Based on their membership in the Celtic Bar Association, including the fact that Dawe and the arbitrator had both attended an MCLE trip to Scotland in 2006 sponsored by that bar, Bohm "conclude[d] that we did not have a fair and impartial arbitrator."

On April 17th, Bohm filed a motion with the arbitrator requesting that he vacate his tentative opinion and recuse himself from the matter to avoid the appearance of bias. Dawe filed a declaration stating that he attended only "six or seven" Celtic Bar Association meetings over several years and that, "[w]hile I may have seen Judge

Thomas at one or more of the . . . meetings, I have absolutely no recollection of having done so, or having ever spoken with him at any such meetings." Dawe believed he had mentioned the Scotland trip in a telephonic conference with Bohm and the arbitrator during the arbitration while they waited several minutes for a witness to come on the line.

In any event, Dawe did not believe the arbitrator would have any reason to remember him being on the 10-day trip, which included 65 other attendees, because Dawe only spoke to him once. "My wife and I were admiring the extraordinary sight of a herd of shaggy long haired cows standing in knee-deep mud in a pasture behind Culloden House when Judge Thomas, Victoria Thomas, attorney Jaime Duarte, and two individuals whose names I do not presently know, approached us. Like my wife and I, they appeared to be walking the grounds and taking in the scenery. We spent a few light moments exchanging comments, primarily about the cows, and went on our separate ways. Other than that I have no recollection whatsoever of having any direct social contact with Judge Thomas either on the Scotland trip, or at any other time, ever."

Dawe had one other incidental contact involving the arbitrator on the trip, "while waiting at an airport." He "had just finished reading a paperback book on the demise of ENRON. I approached a group of six or seven people who were also sitting in the waiting room at the airport and offered the paperback book to anyone in the group who might be interested [in it] for reading on the aircraft. Victoria Thomas indicated that she might find the book interesting and I gave it to her. That exchange might have taken a total of two minutes."

The arbitrator declined to vacate his tentative award or recuse himself, and instead issued a final award in July 2007.[2] The Christensens now appeal the trial court's judgment confirming the award rather than vacating it.

II

DISCUSSION

A. *The Arbitration Award Is Not Appealable for Legal Error*

The Christensens assert the arbitration award may be appealed to review the award for legal error. Specifically, the Christensens contend the arbitrator erred in awarding Smith $543,451.00 for the absence of a second dock. They argue the amount constitutes a mistake of law because, according to the Christensens, the arbitrator found the market value of the property was what Smith paid for it, and therefore he suffered no damages.[3] The Christensens also argue the arbitrator failed to impute to Smith under dual agency law knowledge the Christensens' real estate agent may have had concerning the suspect future of the second dock.[4] The Christensens' legal claims are unreviewable.

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[2] Smith requests that we take judicial notice of the Christensens' attempt to preempt the arbitrator's final ruling by seeking an injunction and declaratory relief from the trial court. But the issue has no bearing of our resolution of the appeal, and we therefore deny Smith's motion.

[3] According to Smith, however, the arbitrator found the purchase price, $8,350,000.00, was the market value of the property with two docks, not one.

[4] The Christensens assume the arbitrator found the agent's testimony credible. (But see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [judgments below are "'presumed correct'" and "'All intendments and presumptions are indulged to support it'"]; see also *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 ["The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted"].)

Generally, "[i]n an arbitration, 'the parties do not get to appeal an adverse decision.'" (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 167 (*Evans*).)

Relying on *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334 (*DirecTV*), the Christensens contend an exception applies to the general rule precluding review for legal error. In *DirecTV*, our Supreme Court explained that "while the statutory grounds for correction and vacation of arbitration awards do not ordinarily include errors of law, contractual limitations on the arbitrators' powers can alter the usual scope of review." (*DirecTV, supra*, 44 Cal.4th at p. 1356; see Code Civ. Proc., §§ 1286.2, subd. (a)(4); 1286.6, subd. (b) [statutes governing judicial review to correct or vacate award include ground that "[t]he arbitrators exceeded their powers"].) The Supreme Court held in *DirecTV* that an "expanded scope of review *would* be available under a clause specifically tailored for that purpose." (*DirecTV, supra*, 44 Cal.4th at p. 1345.) But "to take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts." (*Id.* at p. 1361.)

In *DirecTV*, the parties' arbitration clause stated: "'The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.'" (*DirecTV, supra*, 44 Cal.4th at p. 1361, fn. 20.) The Supreme Court concluded the first clause of this formulation "deprive[ed] the arbitrators of the power to commit legal error" and the second clause "specifically provided for judicial review of such error." (*Id.* at p. 1361.) The court did not decide "whether one or the other of these clauses alone, or some different formulation, would be sufficient to confer an expanded scope of review," but "emphasize[d] that parties seeking to allow judicial review of the merits, and to avoid

an additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously." (*Ibid.*)

Here, the parties' arbitration agreement provides that "[t]he arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate law experience, unless the parties mutually agree to a different arbitrator, *who shall render an award in accordance with substantive California Law*." (Italics added.) This language provides no hint the parties contemplated appellate review of the merits. True, the final clause specifies "substantive California Law" is to govern the arbitration, but the language and its context, a standard form real estate contract, merely provides a routine identification of forum law. The language, appended in a trailing clause, simply does not convey that the parties resolved to contravene the "general rule" of arbitral finality (*DirecTV, supra*, 44 Cal.4th at p. 1361) by subjecting each other to the time and expense of further court proceedings and the arbitrator to appellate policing.

Unlike *DirecTV*, the terms here do not expressly deprive the arbitrator of the power to commit legal error. As the Supreme Court observed in *DirecTV*, "A provision requiring arbitrators to apply the law leaves open the possibility that they are empowered to apply it 'wrongly as well as rightly.'" (*DirecTV, supra*, 44 Cal.4th at p. 1360.) After all, "'"[t]he arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement."' [Citations.]" (*Id.* at p. 1361.) *DirecTV* cautioned parties to "*expressly* provide for an expanded scope of review" to distinguish their agreement from "the usual expectations of parties to arbitration agreements, who accept the risk of legal error in exchange for the benefits of a quick, inexpensive, and conclusive resolution." (*Id.* at p. 1360.) Because the parties did not do so, there is no basis for the expanded appellate review the Christensens now seek.

Additional language from the arbitration agreement provides an independent ground for our conclusion. The arbitration agreement specifies: "Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act" (FAA). The FAA, unlike the California Arbitration Act (CAA) as construed in *DirecTV*, does not permit parties to contract for judicial review for legal error. Accordingly, we do not interpret the agreement to mean the parties intended the expanded review the Christensens now advocate. (See *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) ___ U.S. ___, 128 S.Ct. 1396, 1405 ["Instead of fighting the text, it makes more sense to see the [FAA's] three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process'"]; see also *DirecTV*, *supra*, 44 Cal.4th at pp. 1352-1354 & p. 1350, fn. 12 [distinguishing CAA from FAA in contract where latter governed arbitral procedures but not review].) Consequently, the Christensens' request that we review the award for legal error is without merit.

B. *The Trial Court Did Not Err in Declining to Vacate the Award for Bias*

The Christensens sought to vacate the arbitrator's award because of bias (Code Civ. Proc., § 1286.2, subd. (a)(1), (3) & (6)), and contend the trial court erred in rejecting their argument. We disagree. "'The party claiming bias bears the burden of establishing facts supporting its position. [Citation.] The test is objective, i.e., whether the relationship would create an impression of bias in the mind of a reasonable person. [Citation.]'" (*Evans*, *supra*, 134 Cal.App.4th at p. 162.)

The Christensens argue the test for bias should be subjective, to account for a party's unilateral, absolute right to strike one arbitrator peremptorily. (Code Civ. Proc., § 1281.91, subd. (b)(2).) Such a capricious standard, however, would annihilate arbitration as a means of dispute resolution. Put simply, "[i]f the impression of possible bias rule is not to emasculate the policy of the law in favor of the finality of arbitration, the impression must be a reasonable one." (*San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.* (1972) 28 Cal.App.3d 556, 568 (*San Luis Obispo*).)

The Christensens also argue a heightened test for bias should apply because the arbitrator "made representations that expanded the disclosure obligations beyond the statutory and ethical guidelines." (Original capitalization modified.) Not so. The statutory and ethical guidelines incorporate the objective test for bias, and the arbitrator did nothing to expand the criteria for disclosure. (See Code Civ. Proc., § 1281.9, subd. (a) [arbitrator's disclosure responsibility measured objectively by whether facts would "reasonably" cast doubt on arbitrator's impartiality]; Cal. Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, standard 7(d) (hereafter Ethics Standards) [same].) The arbitrator's disclosure form merely reiterated this standard, noting he "made a reasonable effort to inform him[]self of any matters that could cause a person aware of the facts to *reasonably entertain a doubt that . . . []he would be able to be impartial*." (Italics added.) Consequently, there is no basis for the Christensens' claim a heightened test for bias should apply.

Turning to the Christensens' evidence of bias, the trial court could reasonably find it lacking. The Christensens argue the arbitrator and Dawe should have disclosed their common membership in the Celtic Bar Association. But mere membership "in the same professional organization is in itself hardly a credible basis for

inferring even an impression of bias." (*San Luis Obispo, supra*, 28 Cal.App.3d at p. 567.) The Christensens distinguish the Celtic Bar Association as not "mak[ing] any pretense about being a source of legal education for attorneys," but rather, by its own description, existing to "'promote camaraderie among its membership . . . .'" Given the acrimony that may arise among lawyers in litigation, the goal is a laudable one, and no reasonable person would develop an impression of bias based merely on membership in the same organization.

The Christensens intimate that the arbitrator and Dawe's common membership in a Celtic organization made them "drinking buddies," but no evidence supports this insinuation. Dawe had been a member of the association only "three to four years" and, in that time, never recalled seeing the arbitrator at any of the few meetings Dawe attended. By the Christensens' logic, their attorney's attendance at the St. Patrick's Day party at Muldoon's, which Dawe and the arbitrator both also attended, made Bohm as much the arbitrator's "drinking buddy" as Dawe. The Christensens' complaint of bias is not based in reason.

The Christensens next point to the Scotland trip as evidence of bias. But the evidence showed only two contacts on the trip, both incidental, once with a group taking in the "extraordinary" sight of "shaggy long haired cows standing in knee-deep mud in a pasture" and once in an airport when Dawe offered the copy of the paperback he finished reading to other waiting passengers and the arbitrator's wife accepted it. The Christensens highlight the exchange of the paperback as a "gift" sowing a seed for later bias, but no reasonable person would view such a trivial travel courtesy with suspicion.

According to Dawe's uncontradicted testimony, "[b]y the time we returned from the trip to Scotland I had absolutely no reason to believe that Judge Thomas or

Victoria Thomas would have known either me or my wife by name or appearance." Neither Dawe nor his wife socialized with the arbitrator or his wife during the trip "or at any other time, ever," according to Dawe's declaration. Indeed, Dawe's contact with the arbitrator was so minimal in their chance encounters that he was not even introduced to the arbitrator's wife. The Ethics Standards require disclosure when "[t]he arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or lawyer for a party." (Ethics Standards, std. 7(d)(3).) No reasonable observer would view Dawe's two interactions with the arbitrator and his wife as a significant personal relationship. Consequently, the trial court did not err in concluding the Scotland trip did not furnish a basis for a reasonable impression of bias.

The Christensens argue Dawe's and the arbitrator's Celtic Bar Association membership and the Scotland trip should not be viewed in isolation. Rather, these contacts, when cumulated with the "totality of the available facts," including the claimed legal errors the Christensens perceive in the award, coalesce to create an impression of bias. The Christensens raised the alleged legal errors as evidence of bias below. But we will not, in this manner, be drawn into examining the award for legal error, an issue that is unreviewable as discussed *supra*. In short, the Christensens's disappointment with the result cannot be transmuted into evidence of bias. Nothing in the Christensens's evidence suggests bias, and the absence of bias cannot be cumulated to somehow produce an impression of bias.

III

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TED E. CHRISTENSEN et al., Plaintiffs and Appellants, v. WILLIAM W. SMITH, Jr., Defendant and Respondent.	G039923 (consol. w/ G040103) (Super. Ct. Nos. 07CC19622, 07CC19727) ORDER GRANTING REQUEST FOR PUBLICATION

The law firm of Boies, Schiller & Flexner has requested that our opinion, filed on January 28, 2009, be certified for publication. It appears portions of the opinion meet the standards set forth in California Rules of Court, rule 8.1105(c). The request is therefore GRANTED IN PART. (See Cal. Rules of Court, rule 8.1110 [providing for partial publication].) Accordingly, the opinion is ordered published in the Official Reports, with the exception of section II, subsection B.

O'LEARY, J.